IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 26

JAMES EDMUND GROPPI,

Appellant,

—v.—

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLANT

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Opinion Below

The opinion of the Supreme Court of Wisconsin is reported at 41 Wis. 2d 312, 164 N.W.2d 266 (1969) and is set forth in the Appendix, at pp. 205-231.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of WIS. STAT. ANN. §956.03(3) *infra*, p. 2, on the ground that it is repugnant to the Constitution of the United States.

Appellant was convicted of resisting arrest in the Circuit Court of Milwaukee County. A change of venue was denied

on the ground that WIS. STAT. ANN. §956.03(3) did not permit a change of venue in a misdemeanor case. On appeal, his conviction and sentence were affirmed on February 4, 1969. On April 1, 1969 a petition for rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Wisconsin on May 6, 1969. As the Supreme Court of Wisconsin explicitly held that under WIS. STAT. ANN. §956.03(3) a change of venue was not permitted in a misdemeanor case, and rejected appellant's federal constitutional challenges to said statute, this matter was appropriately brought to this Court by appeal. On June 15, 1970, this Court noted probable jurisdiction.

Constitutional and Statutory Provisions Involved

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves §956.03(3) of Wisconsin Statutes, which states:

> If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

Question Presented

Whether WIS. STAT. ANN. §956.03(3), which prohibits Wisconsin trial courts from granting a change of venue in a misdemeanor case, regardless of the extent of community prejudice, violates the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

Statement

Appellant James E. Groppi, a Roman Catholic priest, was charged with resisting arrest under WIS. STAT. ANN. §946.41, a misdemeanor punishable by a maximum of one year imprisonment in a county jail and a five hundred dollar fine, as a result of an incident arising out of a civil rights march in Milwaukee, Wisconsin on August 31, 1967 (A. 2-5, 72-73, 123-25).[1] Father Groppi was convicted by a jury of resisting arrest on February 9, 1968 (A. 50, 183-84). He was sentenced to a six months suspended sentence and placed on two years probation. He was additionally sentenced to pay a fine of five hundred dollars and costs and in default of payment within twenty-four hours, to serve another six months in jail (A. 51).[2]

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[1] Specifically, appellant was charged with:

> Unlawfully, knowingly resist[ing] Wilfred Buchanan, a duly appointed, qualified, and acting police officer of the City of Milwaukee, in said County, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity, and with lawful authority, to-wit: . . . while said defendant was being carried to a police wagon, after being placed under arrest, said defendant began kicking his legs, striking said officer Wilfred Buchanan in the body with his foot; that said defendant [swore at Wilfred Buchanan]. (A. 4)

[2] On October 11, 1969, appellant was arrested and on October 17, 1969, his probation was revoked and he was ordered to commence serving his sentence of six months imprisonment (with credit for time served totalling six days). *Wisconsin* v. *Groppi*, Milwaukee County Circuit Court, Branch 12, #G-4718, Hearing to Determine Revocation of Probation, October 17, 1969. On October 27, 1969, Mr. Justice Marshall stayed execution of this sentence and ordered appellant released pending this Court's decision on jurisdiction and, assuming probable jurisdiction was noted, pending this Court's mandate.

Revocation was for violation of the conditions of probation and followed upon appellant's alleged participation in a demonstration

On February 4, 1969, the Supreme Court of Wisconsin affirmed appellant's conviction and sentence; Chief Justice Hallows concurred, and Justices Heffernan and Wilkie dissented (A. 202-31). A motion for rehearing was denied on April 1, 1969 (A. 232).

1. Events Prior to Appellant's Charge for Resisting Arrest.

Prior to and during the incidents that led to his arrest, appellant was advisor to the Youth Council of the Milwaukee Chapter of the National Association for the Advancement of Colored People (hereinafter NAACP), a group in the Milwaukee area actively supporting efforts of Negro citizens to obtain equal civil rights.

On August 30, 1967, the Mayor of Milwaukee issued a proclamation prohibiting all "marches, parades, demonstrations, or other similar activities" in Milwaukee between the hours of 4 P.M. and 9 A.M. for a thirty-day period (A. 46-47). The proclamation was the Mayor's response to several civil rights demonstrations and marches in which the Youth Council had participated "for a fair housing bill,

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in the Chambers of the Wisconsin State Assembly in Madison, Wisconsin on September 29, 1969 and subsequent conviction for contempt by that Assembly on October 1, 1969. The United States District Court for the Western District of Wisconsin subsequently granted appellant's habeas corpus application challenging his contempt conviction and sentence, on the ground that the Wisconsin Assembly had convicted him without providing him the procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment. *Groppi* v. *Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970). See also the connected case of *Groppi* v. *Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970). The court's decision in *Groppi* v. *Leslie* had, of course, no effect on the previous revocation of appellant's probation, and appellant therefore remains subject to imposition of his six-month sentence of imprisonment pending this Court's decision on the merits of the instant case.

to consider the right of freedom of movement within the confines of our country . . . " (A. 126).

On August 31, 1967, Father Groppi along with an assembly of black and white people from the community met at St. Boniface's Church [located at the corner of North 11th and West Meinecke] to discuss "the Mayor's Proclamation, the demonstrations, and the arrest of Youth Council members and people of the community on the previous night" (A. 126). Between 7 P.M. and 8 P.M. three to four hundred persons from that assembly decided to march from the church to City Hall in order to "question the Mayor on the Proclamation" (A. 127). They marched very slowly in a peaceful and orderly fashion, three or four abreast, arms locked, south on North Eleventh Street (A. 72-73, 78, 83, 123). Father Groppi was one of those at the head of the march (A. 133). The group turned east on West North Avenue, and continued marching (A. 78-79, 81-83).

While the group was still on North Eleventh Street, prior to marching down West North Avenue, Inspector Ullius of the Milwaukee Police Department announced that the march was in violation of the Mayor's proclamation (A. 79). Although Ullius used a bullhorn and repeated his warning, he testified that because of the "singing and booing," he did not know how many marchers actually heard him (A. 79, 82-83). Appellant himself testified that he did not recall hearing any warning, although he did not deny that in fact one might have been given (A. 127, 133-34).

When the march continued Inspector Ullius ordered "police action, to stop the march" (A. 79-80, 83). Patrolman Armando Brazzoni, who had been walking alongside Father

Groppi, immediately arrested him (A. 83-84, 93, 98) by "grabb[ing] him around the right shoulder and collar" (A. 98). There is no contention that Father Groppi offered any resistance. Patrolman Brazzoni and a Sergeant Miller took Father Groppi to a waiting paddy wagon (A. 87, 98-99). After walking some twenty or thirty yards with the officers, and as he approached the paddy wagon (A. 135), Father Groppi "became limp in body, and sat in the street" (A. 87, 98-99, 124). Father Groppi's "going limp" was not contested (A. 73, 135),[3] nor was it a basis for the resisting arrest charge (A. 176-78).

2. The Resisting Arrest Charge.

Events subsequent to Father Groppi's "going limp" formed the basis of the charge of resisting arrest (A. 176-78). The police and appellant's versions of these events were in sharp conflict. The State called as witnesses the three police officers who "carried" Father Groppi from his "limp" position on the street to the paddy wagon (A. 87, 98-99, 110-12). Defense counsel called Father Groppi (A. 125), two newspaper reporters (A. 152, 155), and three marchers (A. 143, 160, 166), all of whom were near Father Groppi when the alleged resistance occurred (A. 127-29, 154-55, 157-58, 145-47, 161-62, 168-69).

The police officers testified that after Patrolman Brazzoni gave his shotgun to another officer (A. 99), he picked Father Groppi up from his limp position by the "upper part of his body, by the shoulders" (A. 88). At the same time Sergeant Miller picked up his right leg and an Offi-

[3] When asked why he went limp, Father Groppi responded, "I was arrested a number of times in Civil Rights demonstrations, going limp, does not constitute resisting arrest, and I went limp" (A. 135).

cer Buchanan his left leg (A. 88). Buchanan had his night stick in a hand that was around Groppi's leg (A. 112, 115). The officers then carried Father Groppi to the paddy wagon (A. 88, 100, 112). Sergeant Miller testified that as they neared the wagon "Father Groppi suddenly became violent . . . He kicked out with his left leg at Officer Buchanan, catching him in the chest and he [appellant] hollered out, 'let go my leg you .....'" (A. 89). Patrolman Brazzoni testified similarly but added that Father Groppi was "kicking his feet in a motion, like pedaling a bicycle" during the entire time he was being carried (A. 99-101). When they arrived at the wagon, Father Groppi's body jerked—"I don't know what caused the jerk" (A. 101), and at this time Father Groppi said, "I want that man's badge number" (referring to Officer Buchanan) (A. 102). Buchanan's testimony did not materially differ from Brazzoni's. He stated that when they arrived at the wagon he had been kicked by Father Groppi on the chest and knocked to one knee (A. 112).

Father Groppi's version of the facts conflicted with that of the officers. He testified that while being carried to the wagon "My foot began to hurt . . . as if someone were digging their fingernails into my foot . . ." (A. 128). This continued and as he arrived near the wagon he said to Brazzoni: "he [referring to Buchanan] is gouging his fingers into my foot," and asked, "what is that officer's badge number . . . I noticed he wasn't wearing a badge . . . what is that officer's name. . . ." Brazzoni said "that is for you to find out" (A. 129).[4] Groppi conceded that he "did react to the pressure placed on my leg" but only by at-

[4] When Buchanan was asked on cross-examination why he didn't wear a badge on the night of August 31, he responded that he was "under orders from the Department not to wear one" and he further stated, "I don't question my superiors" (A. 114).

tempting to wiggle his foot free of the gouging. He flatly denied, however, that he had kicked Buchanan in the chest (A. 130, 139-40).

A reporter for the Milwaukee *Journal*, who was approximately 15 to 20 feet from the paddy wagon, testified that "at no time when I was in the vicinity, did I hear him use any profanity" (A. 154). The chief photographer from WISN T.V., who was also standing about fifteen feet from the paddy wagon, stated that he did not see Father Groppi kick a police officer or hear him use profanity (A. 157).

Three other defense witnesses, all of whom were arrested as marchers, testified that they saw no kicking and heard no profanity. On the contrary, they stated that Father Groppi was complaining about the gouging of his foot while being carried (A. 145-47, 161-64, 168-69).

During the jury's deliberations, some members requested to have read "all testimony—of when Father Groppi was picked up in limp position and carried to police patrol wagon." Their request was refused (A. 181-82).

3. Rulings of the Courts Below.

On September 26, 1967, prior to trial, appellant moved for a change of venue from the Circuit Court of Milwaukee County "to a county where community prejudice against this defendant does not exist and where an impartial jury trial can be had" (A. 23). The motion requested the court to "take judicial notice of the massive coverage by all news media . . . of the activities of this defendant . . . or in the alternative, that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." In an attached

affidavit appellant alleged that he believed he could not receive an impartial jury trial in Milwaukee County because of the community prejudice caused by the massive and frequently adverse news coverage and publicity, as well as critical editorials, he had received as a civil rights leader in all of the news media in Milwaukee County (A. 24-25). The motion was denied by the trial judge October 2, 1967, "because this is a misdemeanor case and not a felony. And the Wisconsin statute [WIS. STAT. ANN. §956.03(3)] does not provide for a change of venue in a misdemeanor matter. . . . Not in a misdemeanor matter; a felony only" (A. 9).[5] On December 11, 1967, appellant entered a plea of not guilty, but soon after his trial began a juror became ill and a mistrial was declared. The case was continued to February 8, 1968.

On January 10, 1968, prior to appellant's second trial, he moved to dismiss on the ground that the Wisconsin change of venue statute was unconstitutional because it allowed for a change of venue on the grounds of community prejudice only in felonies and not in misdemeanors (A. 37). At the beginning of appellant's trial, the court denied this motion noting that this was a matter for the legislature, not the courts, to resolve (A. 69-70).

After a verdict of guilty was returned by the jury on February 9, 1968, appellant moved to set aside the verdict and enter a verdict of not guilty or, alternatively, order a new trial, in part on the grounds that (1) the trial court erred in denying defendant's motion for a

[5] WIS. STAT. ANN. §956.03(3) states:

If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

change of venue on the ground that the change of venue statute applied only to felonies; and (2) that the change of venue statute was unconstitutional in that it denied to a defendant charged with a misdemeanor the right to a fair trial as required by the Fourteenth Amendment to the United States Constitution (A. 52-54). The trial court denied the motion.

On appeal, the Supreme Court of Wisconsin squarely rejected appellant's contentions that WIS. STAT. ANN. §956.03(3) both on its face and as applied in the instant case was in violation of due process of law as guaranteed by the Wisconsin and federal constitutions and of the Equal Protection Clause of the federal constitution.

The majority opinion specifically interpreted WIS. STAT. ANN. §956.03(3) as providing "that a change of venue based on community prejudice shall only be permitted in felony cases" (A. 211). It upheld the constitutionality of this limitation on the following grounds:

> We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction.
>
> . . . Moreover, it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and prolonged attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.
>
> The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legis-

> lature is not concerned with justice, but because society demands that efficiency in the administration of justice be given consideration along with absolute fairness. (A. 209-10)

The majority also noted that change of venue was only one method of ensuring a fair trial, and that a defendant in a misdemeanor case could rely instead on his rights to a continuance and to challenge jurors in *voir dire* proceedings; and that he also had the alternative of proving after verdict that he had been denied a fair trial (A. 213-14).

Chief Justice Hallows concurred solely on the ground that appellant had not proved he had been prejudiced. He agreed with the minority that "an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice" (A. 230-31).

Justices Heffernan and Wilkie dissented:

> The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it, this proposition runs counter to all principles of Anglo-American jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to *confer* additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is pow-

erless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a misdemeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice, irrespective of the nature or seriousness of the crime charged. (A. 219-20)

* * * * *

In the instant case, a jury is guaranteed by the Wisconsin Constitution, and *Duncan* makes it clear that a jury must be impartial. A litigant is constitutionally entitled to invoke the device of change of venue to determine whether or not a trial may be had free from the contamination of community prejudice. Where the trial of a misdemeanant is before a judge, under Wisconsin law he may file an affidavit of prejudice if he thinks it necessary to assure a fair trial. He should not have a lesser right to a fair and impartial trial if he invokes his constitutional prerogative of trial by jury. (A. 222-23)

The dissent also noted that defendant had been denied any opportunity to make a record of community prejudice (A. 228-29); and that the alternatives to change of venue available to a misdemeanant, such as *voir dire* procedures, could not necessarily ensure an impartial trial (A. 226; 224-28).

Summary of Argument

It is appellant's contention in Argument I, *infra,* pp. 15-33, that the right to change of venue is, under certain circumstances, a constitutionally required means of ensuring a criminal defendant's right to an impartial jury and, therefore, that in denying appellant all opportunity for a change of venue, regardless of the extent of community prejudice, in a case in which he was constitutionally entitled to a jury trial, Wisconsin violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Appellant was charged with a misdemeanor punishable by a maximum in excess of six months' imprisonment, and therefore entitled under the federal constitution to trial by an impartial jury. The common law right to change of venue has been traditionally considered an integral part of the right to jury trial and is today guaranteed to criminal defendants in every state and in the federal system. And in recent years this Court has recognized that in certain cases it is a constitutionally required means of ensuring an impartial jury. While the Wisconsin Supreme Court contended that the defendant in a misdemeanor case could rely on such procedures as the *voir dire,* continuance, and post-verdict showings that he had in fact not received a fair trial, these procedures have not alone proven adequate to protect defendants against the danger of a trial contaminated by community prejudice. Therefore, in denying appellant any opportunity to show that change of venue was required to ensure a fair trial in the instant case, Wisconsin violated his federal constitutional rights to an impartial jury and to due process of the law.

Appellant further contends in Argument II, *infra,* pp. 34-37, that since Wisconsin has chosen to grant the right to change of venue to persons charged with felonies, and has recognized it as an essential means of protecting the right to a fair trial, denial of that right to appellant solely because he was charged with a misdemeanor violated his right to equal protection of the law under the Fourteenth Amendment. As the instant case reveals, misdemeanor prosecutions may well involve community prejudice threatening to a defendant's right to an impartial trial. The distinction between felony and misdemeanor in Wisconsin

is based on no coherent or consistent principle of classification, and is totally unrelated to the reasons that change of venue should be granted. Therefore, the Wisconsin statute absolutely denying persons charged with misdemeanors any right to change of venue violates the Equal Protection Clause.

Argument

Introduction

Both the trial court and the Wisconsin Supreme Court clearly held that WIS. STAT. ANN. §956.03(3) prohibits absolutely a change of venue in all misdemeanor cases (*supra*, pp. 9-10). Therefore this Court is squarely presented with the question whether a State which provides a right to change of venue in felony cases can deny that right to defendants in misdemeanor cases, punishable by a maximum of up to one year imprisonment. Appellant contends that such a denial constitutes a violation of the right to a fair and impartial trial, and to the equal protection of the laws as guaranteed by the Sixth Amendment and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

It is clear that in the instant case appellant had no opportunity to show that community prejudice against him was such that he could not obtain a fair and impartial jury trial in Milwaukee County.[6] But this case nevertheless is

[6] As noted *supra* pp. 8-9, in his motion for change of venue appellant asked the court to take judicial notice of the massive and prejudicial news coverage he had received or, alternatively, to allow him to offer proof as to its nature and effect, in addition to filing an affidavit describing in brief such coverage. Since the trial court denied that motion on the ground that the Wisconsin statute did not permit change of venue in a misdemeanor case, there was no occasion or opportunity for him then or subsequently to provide further proof of the nature and extent of coverage and the probability that community prejudice was such as to prevent his receiving a fair and impartial trial. The Wisconsin Supreme Court argued that appellant had an opportunity *after* conviction to prove that he had *in fact* been denied his right to an impartial

one in which the potential for violation of appellant's right to a fair and impartial trial is obvious. Appellant was a well-known and controversial civil rights leader in Milwaukee County who had been subjected to widespread and largely hostile publicity. His charge for resisting arrest arose out of what the officials of Milwaukee obviously considered a major crime—that of violating the Mayor's proclamation prohibiting marches and demonstrations. The crucial facts determinative of his guilt of the charge of resisting arrest were subject to conflicting testimony at trial. It was obviously essential that he be provided with all procedural safeguards necessary to ensure that the finders of fact would be impartial and base their verdict not on preconceived prejudice but on the evidence at trial.

I.

Wis. Stat. Ann. §956.03(3) Violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment in Denying a Defendant's Right to a Fair and Impartial Jury Trial by Totally Prohibiting a Change of Venue in Certain Serious Criminal Prosecutions Regardless of the Extent of Community Prejudice.

Appellant had a constitutional right to a jury trial in the instant case,[7] and it is clear that the right to jury trial

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trial, but it made no contention that appellant ever had an opportunity to prove that community prejudice existed such as to threaten his chances of receiving an impartial trial and to warrant granting of a change of venue.

[7] Appellant was charged with a misdemeanor punishable by a maximum of one year imprisonment and a five hundred dollar fine (*supra* p. 3). In *Baldwin* v. *New York*, 38 U.S. L. Wk. 4554 (June 22, 1970), this Court held that the States were required under the Sixth Amendment, as applied to the States through the Fourteenth, to provide defendants the right to jury trial for offenses punishable by terms in excess of six months.

Appellant was also entitled to a jury trial under the Wisconsin Constitution. WIS. CONST. Art. 1, §7 provides that in all crimes prosecuted by indictment or information the accused has a right "to a speedy public trial by an impartial jury of the county or

includes the right to an *impartial* jury,[8] and that this right is guaranteed to defendants in state prosecutions through the Fourteenth Amendment.[9] This case, therefore, poses the question whether change of venue may, in some cases, be a constitutionally required means of assuring the criminal defendant's right to an impartial jury. It is appellant's contention that it may and, therefore, that in denying appellant any right to change of venue, regardless of the extent of community prejudice, solely because he was charged with a misdemeanor, Wisconsin violated his right to an impartial jury trial as guaranteed by the Sixth and Fourteenth Amendments.

The right to change of venue is "fundamental to the American scheme of justice", and traditionally available

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district wherein the offense shall have been committed." See also WIS. STAT. ANN. §957.01(1) (1962). Wisconsin courts have found a Constitutional right to jury trial in all misdemeanors. See *State ex rel. Murphy* v. *Voss*, 34 Wis. 2d 501, 149 N.W.2d 595 (1967); *State ex rel. Sauk County District Attorney* v. *Gollmar*, 32 Wis. 2d 406, 145 N.W.2d 670 (1966).

[8] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury*. . . ." (Emphasis added.) The Wisconsin Constitution also guarantees an "impartial jury." See n. 7, *supra;* see also *State* v. *Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965).

[9] See, *e.g.*, *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963); *cf. In Re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process"); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (due process right to a disinterested finder of fact); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) (due process right to have decision by finder of fact substantially determined by evidence at trial).

"in the context of the criminal processes maintained by the American States." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 and n. 14 (1968). It was developed early in the history of the common law courts of England,[10] became a part of our common law heritage,[11] and is now guaranteed to criminal

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[10] See, *e.g.*, *Rex* v. *Harris*, 3 Burr. 1330, 1333, 97 Eng. Rep. 858, 859 (1762) (Lord Mansfield) (dictum):

> Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter cannot be tried at all, or cannot be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county.

See also *Rex* v. *Cowle*, 2 Burr. 834, 859, 97 Eng. Rep. 587, 602 (1759):

> But the law is clear and uniform, as far back as it can be traced. Where the Court has jurisdiction of the matter, if, from any cause, it cannot be tried in the place, it shall be tried as near as may be.

See generally, *Crocker* v. *Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911) (describing at length common law history of the right to change of venue); *Barry* v. *Truax*, 13 N.D. 131, 99 N.W. 769, 774-75 (1904); *State* v. *Albee*, 61 N.H. 423, 60 Am. Rep. 325 (1881).

[11] See, *e.g.*, *Crocker* v. *Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369, 376-77 (1911):

> This review demonstrates that the great weight of authority supports the view that courts, which by statute or custom possess a jurisdiction like that of the King's Bench before our Revolution, have the right to change the place of trial, when justice requires it, to a county where an impartial trial may be had.
>
> If the matter is considered on principle and apart from authority, the same conclusion is reached. It is inconceivable that the people who had inherited the deeply cherished and hardly won principles of English liberty and who depleted their resources in a long and bloody war to maintain their rights of freemen, should have intended to deprive their courts of the power to secure to every citizen an impartial trial before an unprejudiced tribunal. . . . There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and

defendants in every State,[12] as well as in the federal sys-

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prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. . . .

The purpose for which courts are established is to do justice. . . . Where questions of fact are to be settled as in all criminal prosecutions for felony, and in a large number of other causes, a jury is the instrumentality provided by the law for determining those facts. Government itself fails if a jury of just men with minds open only to the truth as shown by the evidence cannot be provided.

See also *Barry* v. *Truax*, 13 N.D. 131, 99 N.W. 769, 772 (1904):

It is entirely clear, therefore, that the right of trial by jury which is secured by the Constitution is the right of trial by jury with which the people who adopted it were familiar, and . . . that right . . . gave to the prosecution, as well as the defense, the right to change the place of trial when necessary to secure a fair and impartial trial.

See also 56 Am. Jur. §42:

. . . [A]ccording to the weight of authority as well as sound reasoning, common law courts have inherent power, particularly in criminal cases, to order a change of venue for purposes of securing impartial trials; the power of the English courts to transfer the trial of transitory actions, thoroughly ingrafted upon the common law long before the independence of this country, is a part of our common law heritage.

[12] The right to change of venue is guaranteed specifically in the Constitutions of many states, and in other states by either statute or court rule. See ALA. CONST. Art. IV, §75, ALA. CODE Tit. 15, §267 (1940); ALASKA STAT. §22.10.040 (Supp. 1962); ARIZ. R. CRIM. P. 201-11; ARK. CONST. Art. 2, §10, ARK. STAT. ANN. §43-1501 (1947); CAL. PEN. CODE §§1033.5, 1431; COLO. CONST. Art. V, §37, COLO. REV. STAT. ANN. §39-9-4 (1963); CONN. GEN. STAT. REV. §54-78 (1958); DEL. CONST. Art. I, §9, DEL. SUPER. CT. (CRIM.) R. 21(a); FLA. STAT. ANN. §911.02 (1944); GA. CONST. Art. VI, §2-5001, GA. CODE ANN. §27-1101, 1201 (1935); HAWAII CONST. Art. I, §11, HAWAII REV. STAT. §711-18 (1968); IDAHO CODE ANN. §19-1801 (1948); ILL. ANN. STAT. ch. 38, §114-6

tem.[12] The recent comprehensive study by the American Bar Association of the effect of prejudicial publicity on the right to a fair trial concluded that the problem was far more serious, and involved more cases, than had previously been assumed,[14] and that change of venue was a useful and often essential means of ensuring defendants an impartial jury.[15]

(1963); IND. RULES OF PROCEDURE, TR 77, CR 12 (1970); IOWA CODE ANN. §§762.13, 778.1 (1946); KAN. STAT. ANN. §62-1318 (1964); KY. REV. STAT. ANN. §§452.210, 452.360 (1963); LA. CODE CRIM. P. §§621, 622 (1966); ME. R. CRIM. P. 21, DIST. CT. CRIM. R. 21 (1969); MD. CONST. Art. IV, §8, MD. ANN. CODE Art. 75, §44 (1957); MASS. ANN. LAWS ch. 277, §51 (1956); MICH. COMP. LAWS ANN. §762.7 (1968); MINN. STAT. ANN. §627.01 (1947); MISS. CODE ANN. §2508 (1956); MO. ANN. STAT. §545.430 (1949), MO. SUP. CT. R. CRIM. P. 22.05, 30.01; MONT. REV. CODES ANN. §95-1710 (Repl. 1967); NEB. REV. STAT. §25-410 (1964); NEV. REV. STAT. §174.455 (1969); N. H. CONST. Pt. I, art. 17; N.J. REV. STAT. §2A:2-13 (1952); N. M. STAT. ANN. §21-5-3 (Supp. 1965); N. Y. CODE CRIM. P. §344; N. C. GEN. STAT. §1-84 (Repl. 1969); N. D. CENT. CODE §29-15-01 (1960); OHIO REV. CODE ANN. §2931.29 (Page 1953); OKLA. CONST. Art. II, §20, OKLA. STAT. ANN. Tit. 22, §561 (1937); ORE. REV. STAT. §131.400, 131.420 (Supp. 1963); PA. CONST. Art. III, §23, PA. STAT. ANN. Tit. 19, §551 (1930); R. I. GEN. LAWS ANN. §8-2-29 (1956); S. C. CONST. Art. VI, §2, S. C. CODE OF LAWS §17-457; S. D. COMP. LAWS §23-28-7 (1967); TENN. CODE ANN. §40-2201 (1955); TEX. CONST. Art. III, §45, TEX. CODE CRIM. P. ANN. Art. 31.01 (1966); UTAH CODE ANN. §77-26-1 (1953); VT. STAT. ANN. Tit. 13, §4631 (1969); VA. CODE ANN. §19.1-224 (1950); WASH. REV. CODE ANN. §10.25.070 (1961); W. VA. CONST. Art. III, §14, W. VA. CODE ANN. §62-3-13 (1966); WIS. STAT. ANN. §956.03(3) (Supp. 1967); WYO. STAT. ANN. §1-59 (1957), WYO. R. CRIM. P. 23 (1968).

Some states additionally authorize a change of venire, a procedure whereby a jury is selected from a community free from prejudice and brought to the trial district. Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 365-66 (1960).

[13] F. R. CRIM. P. 21(a).

[14] *Standards Relating to Fair Trial and Free Press*, 22-25 (A.B.A. Project on Minimum Standards for Criminal Justice, 1966) [hereinafter cited as *Standards Relating to Fair Trial and Free Press*].

[15] *Id.* at 119-28; see also pp. 188, 248, 254.

This Court has made it clear in recent cases that a change of venue may under certain circumstances be constitutionally required under the Sixth and Fourteenth Amendments in order to protect the defendant's right to an impartial jury. Thus *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961), held that the defendant had a due process right to be tried "in an atmosphere undisturbed by so huge a wave of public passion . . . "[16] *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), found a change of venue constitutionally required because of the nature of the pre-trial publicity, without finding any need to consider the attitudes revealed by the jurors on *voir dire*.[17] A number of lower courts have found methods other than change of venue inadequate, in certain circumstances, to ensure an impartial trial.[18] And, indeed, the Wisconsin Supreme Court itself has recognized that due

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[16] The statute involved in *Irvin* provided for only a single change of venue. This Court found it not subject to attack on due process grounds because it had been interpreted by the highest court of the State to permit a second change if "the totality of the surrounding facts" indicated that such a change was needed to ensure a fair trial by an impartial jury (366 U.S. at 721). The clear implication was that a statute which did absolutely prohibit a change of venue would be subject to attack on due process grounds.

[17] In other recent cases this Court has held that in determining whether the defendant received the impartial jury trial guaranteed by the Fourteenth Amendment it was unnecessary to find *actual* bias, but was enough that a significant *potential for* bias existed. *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-52 (1966).

[18] See, *e.g.*, *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952); *United States* v. *Parr*, 17 F.R.D. 512 (S.D. Tex. 1955); *Rubenstein* v. *State*, 407 S.W.2d 793 (Tex. Ct. Crim. App. 1966) (holding it was reversible error for trial court to deny motion for change of venue); *Rogers* v. *State*, 155 Tex. Crim. 423, 236 S.W.

process might require a change of venue. *State* v. *Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965).

Availability of change of venue as a means for ensuring the right to an impartial trial is essential because other methods of protecting defendants against the effects of community prejudice are in many cases seriously inadequate to the task. Thus the American Bar Association's Report on *Standards Relating to Fair Trial and Free Press, supra* p. 19, n. 14, recognized serious deficiencies in the law presently governing such procedures as *voir dire* and continuance and recommended numerous changes to make such procedures more effective in protecting a defendant's right to a fair trial, in addition to recommending fundamental changes in the release of news to and by the press. Nevertheless the Report concluded that even assuming such changes were adopted change of venue would remain an essential means of protecting the defendant's right to a trial free from contamination by community prejudice and, indeed, recommended liberalization of change of venue practice. It is certainly clear that under *present* law, in Wisconsin as elsewhere, other methods of protecting the

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2d 141 (1951) (reversing on ground that failure to grant change of venue violated defendant's right to impartial trial); *Enriquez* v. *State*, 429 S.W.2d 141, 142 (Tex. Ct. Crim. App. 1968) (dictum) (". . . it is apparent that the question of change of venue has become a question of constitutional dimension under the recent decisions of the Supreme Court of the United States"). See also *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963); *Juelich* v. *United States*, 214 F.2d 950 (5th Cir. 1954).

defendant's right to an impartial trial are often wholly inadequate.[19]

The Wisconsin Supreme Court contended that the defendant in a misdemeanor case could rely on "the antiseptic measures of continuance and *voir dire* proceedings" [A. 214].

But this Court explicitly recognized in *Irvin* v. *Dowd* and *Rideau* v. *Louisiana, supra*, p. 20, that *voir dire* may be inadequate because it is often impossible to determine, much less defeat, the subtle operation of prejudice in a criminal trial in a particular community.[20] *Voir dire* is at best of limited effectiveness in determining whether jurors are prejudiced *first* because it depends on an unrealistic faith in jurors' capacity to be completely candid about their

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[19] Thus, for example, in *State* v. *Stevens*, 26 Wis. 2d 451, 132 N.W.2d 502 (1965), the trial judge's method of determining whether the jury had heard an allegedly prejudicial radio broadcast was to ask them *en bloc*, prefacing his question with a reminder that he had admonished them previously not to listen to any broadcast relating to the trial; when no juror answered he asked them whether they had followed his admonition and a number of voices answered yes; this procedure was upheld on appeal. It is the general practice in Wisconsin to allow the jury to separate until the cause is submitted to it for final deliberation except in capital or life imprisonment cases. *State* v. *Cooper*, 4 Wis. 2d 251, 89 N.W.2d 816 (1958); Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 479.

[20] On the ineffectiveness of *voir dire* see generally *Standards Relating to Fair Trial and Free Press*, 54-67, 75, 130-38. See also Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503 (1965). This study was based on a University of Chicago jury project which examined 23 jury trial cases in a federal district court in the mid-west, and included interviews of lawyers and of 225 jurors. It found that the *voir dire* examinations were "perfunctory, stilted affairs, quickly concluded . . ."; and that *voir dire* was grossly ineffective in weeding out unfavorable jurors and even in getting information that would show them to be unfavorable (pp. 503, 505, 528).

opinions and ability to act impartially. Jurors are under a variety of pressures in the *voir dire* situation to assert that they *can* act impartially,[21] and empirical studies have recently given support to the widely-held assumption that they are in fact less than candid.[22]

But even assuming that jurors were completely candid, the fact is that the *voir dire* is a totally ineffective tool for getting at the *unconscious* prejudices which are the most serious threat to a defendant's right to a fair trial.[23]

Defense counsel are, of course, in an extremely difficult position in attempting to get at prejudice, conscious or unconscious, since they run the risk of antagonizing jurors

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[21] *Broeder, supra* n. 20, 38 So. CAL. L. REV. at 526 ("Once in court almost all veniremen wanted to be selected and, in addition, most felt that being challenged would adversely reflect upon their ability to be fair and impugn their good faith"); *Standards Relating to Fair Trial and Free Press,* 57. See *Irvin* v. *Dowd,* 366 U.S. 717, 728 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

[22] *Broeder, supra* n. 20, 38 So. CAL. L. REV. at 506, 513-15, 528; *Standards Relating to Fair Trial and Free Press,* 57, 61, 186-87.

[23] *Standards Relating to Fair Trial and Free Press,* 61-66. For cases reversing on the grounds that jurors' statements of impartiality simply cannot be accepted in the face of significant potential for prejudice; see, *e.g., Irvin* v. *Dowd,* 366 U.S. 717, 728 (1961); *United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364 (2nd Cir.), *cert. denied,* 372 U.S. 978 (1963); *Delany* v. *United States,* 199 F.2d 107 (1st Cir. 1952); *United States ex rel. Sheffield* v. *Waller,* 126 F. Supp. 537, 542 (W.D. La. 1954), *applic. for prob. cause denied,* 224 F.2d 280 (5th Cir. 1955), *cert. denied,* 350 U.S. 922 (1955); *People* v. *McKay,* 37 Cal. 2d 792, 236 P.2d 145 (1951); *People* v. *Hryciuk,* 5 Ill. 2d 176, 184, 125 N.E.2d 61, 65 (1954). See generally Note, *Impartial Jury—20th Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial,* 51 CORN. L. Q. 306, 316 (1966).

by such attempts, during a proceeding which constitutes their first contact with the jury and serves as an important opportunity for engaging its sympathy.[24]

Finally, even assuming effectiveness of *voir dire* in eliminating jurors likely to be prejudiced, in a case which has received a great deal of publicity it may be impossible to obtain an impartial jury except by limiting it to that part of the public which is uninformed of and disinterested in public affairs and hardly likely to constitute the best jurors. It is for this reason, at least in part, that *voir dire* practice allows jurors to sit who have not only read or heard about the case, but have formed opinions of the defendant's guilt, so long as such opinions are not absolutely fixed, and the juror can assert he will be able to decide on the evidence.[25] In a time of increasing news coverage this may be necessary to ensure that the informed, intelligent public can qualify as jurors, but it is also another reason why change of venue is of increasing importance in protecting the right to a fair trial.

While a continuance may sometimes serve the same function as a change of venue, by allowing pervasive community prejudice to dissipate, there are obvious reasons

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[24] AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (1967) §339 [hereinafter cited as AMSTERDAM TRIAL MANUAL]; BROEDER, *supra* n. 20, 38 So. CALIF. L. REV. at 505, 526-27 (Broeder points out the danger of antagonizing the court as well as jurors by prolonged examinations); *Standards Relating to Fair Trial and Free Press,* 126-27.

[25] This is the rule both in Wisconsin (*State* v. *Nutley,* 24 Wis. 2d 527, 129 N.W.2d 155, 162-63 (1964), *cert. denied,* 380 U.S. 918 (1965)), and generally (see *e.g.,* Note, *Community Hostility and the Right to an Impartial Jury,* 60 COLUM. L. REV. 349, 356-59 (1960); *Standards Relating to Fair Trial and Free Press,* 59-60, 126-27, 249; see also AMSTERDAM, TRIAL MANUAL §§326-340).

why it often cannot be an effective substitute: for example, publicity may revive when the case is brought to trial, or delay may be prejudicial by allowing for the death or disappearance of witnesses, or otherwise violate the defendant's constitutional right to a speedy trial.[26]

The Wisconsin Supreme Court has itself recognized that *voir dire* and continuance are not alone sufficient to guarantee an impartial trial in all cases.[27] Similarly the Wisconsin Legislature has recognized the importance of change of venue as a means for ensuring a fair trial: not only is it available in all felony cases, but the right to change of venue exists in *all* cases tried by the court regardless of whether they are felonies, misdemeanors, ordinances or traffic cases. WIS. STAT. ANN. §956.03 (1965).

The Wisconsin Supreme Court also contended that the right to change of venue in misdemeanor cases could be denied because the defendant had the alternative of proving after conviction that he had in fact been denied a fair and impartial trial. This is obviously a constitutionally inadequate alternative. This Court has recognized in a number of recent cases that *actual* prejudice may be impossible to prove and for that reason rules must be fash-

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[26] See *e.g.*, Note, *supra* n. 23, 51 CORN. L. Q. 306 at 314-15 (1966).

[27] See, *e.g.*, *State* v. *Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965), *supra* p. 21, noting that due process may require change of venue; *State ex rel. Schulter* v. *Roraff*, 39 Wis. 2d 342, 159 N.W.2d 25, 31 (1968) ("It is true the ineffectiveness of *voir dire* and judicial admonition to correct prejudice have been recognized. . . . But the ineffectiveness of such methods depends on the particular circumstances in each case"); *cf. State* v. *Woodington*, 31 Wis. 2d 151, 166, 142 N.W.2d 810, 817 (1966) ("the remedies in publicity cases are change of venue, continuance, and careful selection of a jury").

ioned based on the *potential* for prejudice.[28] Additionally, such a remedy is highly inefficient and disruptive of the administration of justice. It puts the defendant to potentially continuous rounds of trial, burdening both him and the judicial system, and it in no way ensures that the jury will ever be drawn from an unbiased source. This Court recognized in *Sheppard* v. *Maxwell*:

> . . . we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.[29]

If, then, change of venue may, depending on the circumstances of the particular case, be a necessary means of ensuring an impartial jury trial, it is clear that Wisconsin cannot entirely deny the right to change of venue in all misdemeanor cases. Since the misdemeanor charged in the instant case involved a penalty in excess of six months' imprisonment, appellant was entitled under the federal constitution to an impartial jury trial (*supra* pp. 15-16, nn. 7-9) and, therefore, to all procedures essential to ensure that the jury provided was in fact impartial. Moreover, since Wisconsin itself provides a right to jury trial in *all* misdemeanors (*supra* n. 7, pp. 15-16), the right to change of venue cannot be limited to cases where the maximum penalty exceeds six months. The right to "[a]

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[28] See *Rideau* v. *Louisiana*, 373 U.S. 723 (1963) and cases cited *supra* n. 17.

[29] 384 U.S. 333, 363 (1966). Thus reversals are often denied on the grounds that defendant should have sought relief from the effects of prejudicial publicity prior to trial. See, *e.g.*, *Darcy* v. *Handy*, 351 U.S. 454, 462-64 (1956); *United States* v. *Rosenberg*, 200 F.2d 666 (2nd Cir. 1952), *cert. denied*, 345 U.S. 965 (1953).

fair trial in a fair tribunal is a basic requirement of due process,"[30] and cannot be denied even in so-called "petty" offenses.[31] If a state chooses to provide a jury as the trier of fact, then it is bound under the federal constitution to ensure that that jury is impartial.[32]

The Wisconsin Supreme Court attempted to justify denial of the right to a change of venue in misdemeanor cases on the ground that ordinarily the community only prejudges the guilt of a person charged with a "horrendous" crime since only such crimes receive "widespread and prolonged attention from the news media," and that "the general public just does not become incensed at the commission of a misdemeanor" (A. 209). But as the dissent put it: "The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue" (A. 220). Moreover, as noted *supra* p. 25, Wisconsin itself provides for a change of venue on grounds of community prejudice in cases tried to the court whether they be felonies, misdemeanors, ordinances or traffic cases.[33] While it may well be true that felonies are more likely, on the whole, to involve problems of community prejudice,

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[30] *In re Murchison*, 349 U.S. 133, 136 (1955).

[31] See, *e.g.*, *Thompson* v. *Louisville*, 362 U.S. 199 (1960), finding a violation of the due process right to a fair trial in a case involving conviction of an ordinance in a police court.

[32] See, *e.g.*, *Turner* v. *Louisiana*, 379 U.S. 466 (1965), and other cases cited *supra*, n. 9; see generally AMSTERDAM, TRIAL MANUAL §315.

[33] This raises the additional question as to whether Wisconsin has placed an unconstitutional burden on the right to jury trial in misdemeanor cases by allowing for a change of venue on grounds of community prejudice only where the defendant is tried by the court.

the factors contributing to such prejudice are varied and may have little or nothing to do with whether the crime charged is technically classified as a felony or a misdemeanor. Thus prejudice may be aroused because of activities related to but not contained in the technical charge,[34] because of the controversial character of the person charged,[35] or because the crime affected a large number of people in the community.[36]

Indeed, the Wisconsin Supreme Court's reasoning is refuted by the facts of this case. Appellant is a controversial figure who has spoken out and participated in marches and demonstrations against racial discrimination in his community. It is beyond dispute that his goals and activities have stirred many to anger and hostility against him, and have received prolonged attention from the news media in Milwaukee. It is obvious that the general public has often "become incensed," to use the language of the Wisconsin Supreme Court, at his behavior, just as portions of the general public became incensed at that of other civil rights leaders. His charge of resisting arrest, while technically a misdemeanor, arose out of what the officials of Milwaukee obviously considered a crime of major proportions—that of violating the Mayor's proclamation by leading a march. It is simply erroneous to assert that men

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[34] See, *e.g.*, *United States* v. *Dioguardi*, 147 F. Supp. 421 (S. D. N.Y. 1956) (continuance granted; conspiracy to transport person in interstate commerce to avoid prosecution for having blinded and disfigured well-known newspaper columnist by throwing acid in his face).

[35] *Estes* v. *Texas*, 381 U.S. 532 (1965); *United States* v. *Parr*, 17 F.R.D. 512 (S.D. Tex. 1955); Austin, *Prejudice and Change of Venue*, 68 DICK. L. REV. 401, 402 (1964).

[36] See Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 364 (1960).

like Father Groppi have so little stirred those opposed to them to anger as never to prejudice their right to a fair trial in a misdemeanor case; and it is no accident that cases involving civil rights leaders commonly involve prosecution for technically minor offenses.[37] Community prejudice arises when the activities of a person or group challenge deeply felt beliefs and feelings, and does not depend on whether a particular criminal charge arising out of those activities is classified as a misdemeanor or a felony.

The Supreme Court of Wisconsin also reasoned that limitation of the right to change of venue to felony cases promoted "efficiency in the administration of justice" (A. 210) in view of the large numbers of misdemeanor prosecutions. Such arguments did not deter this court from extending the right to jury trial in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); or *Baldwin* v. *New York*, 38 U.S. L. Wk. 4554 (1970). Moreover these cases granted defendants a *right*, exercisable at their option. Change of venue is a remedy dependent on the trial judge's discretionary decision as to whether or not it is in fact necessary to ensure an impartial trial. Thus the notion that authorizing trial

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[37] Thus the civil rights movement has often stimulated local hostility by activities such as marching, sitting-in and demonstrating, which have resulted in arrests for such offenses as parading without a permit, distributing leaflets, breach of the peace, obstruction of public passages, picketing, trespass, disorderly conduct, and refusing to obey police orders. See, *e.g.*, *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963); 376 U.S. 339 (1964); 382 U.S. 87 (1965); 394 U.S. 147 (1969); *Gregory* v. *Chicago*, 394 U.S. 111 (1969); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Hague* v. *C.I.O.*, 307 U.S. 496 (1959); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); 379 U.S. 559 (1965); *Bell* v. *Maryland*, 378 U.S. 226 (1964); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Wright* v. *Georgia*, 373 U.S. 284 (1963).

judges to grant a change of venue in misdemeanor cases will open the floodgates to disruption of the administration of justice is unreal. Indeed, studies have revealed that change of venue motions in both felony and misdemeanor cases are rarely made and almost never granted.[35]

Wisconsin's practice of prohibiting entirely the right to change of venue in all misdemeanor cases is almost without precedent. At common law the right to change of venue existed in all courts of general criminal jurisdiction, and no distinction was made between misdemeanors and felonies.[36] The right was considered an integral part of the

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[35] *Standards Relating to Fair Trial and Free Press*, 121, 188, 248, 254. See also Bailey and Golding, *Remedies for Prejudicial Publicity—Change of Venue and Continuance in Federal Criminal Procedure*, 18 Fed. B. J. 56, 64 (1958) (since promulgation of F. R. CRIM. P. 21(a), in 1947, permitting change of venue in misdemeanors as well as felonies, only two reported cases in which change of venue had been granted). See generally Anno, *Pretrial Publicity in Criminal Case as Affecting Defendant's Right to Fair Trial—Federal Cases*, 10 L. Ed. 2d 663 (1964).

[36] See, *e.g.*, *Rex* v. *Harris*, 3 Burr. 1330, 1333, 97 Eng. Rep. 858, 859 (1762) (Lord Mansfield) (dictum), involving motion for change of venue in a misdemeanor case, quoted *supra* n. 10; *Rex* v. *Cowle*, 2 Burr. 834, 860, 97 Eng. Rep. 587, 602 (1759), *supra* n. 10, citing a number of cases involving misdemeanors. In *Barry* v. *Truax*, 13 N.D. 131, 99 N.W. 769, 774 (1904), the court stated:

> In England the King's Bench had general supervisory jurisdiction, in criminal cases, coextensive with the kingdom, and a change of the place of trial from the county of the offense in criminal cases was effected by aid of a writ of certiorari issued by that court. . . . It will appear from an examination of these cases . . . that *no distinction was made between misdemeanors and felonies, except that in case of a felony the showing by a defendant that a fair and impartial trial could not be had must be more conclusive than in case of a mere misdemeanor* (emphasis added).

The court went on to say that the Queen's Bench also had the same jurisdiction to change venue in a misdemeanor as in a felony

right to jury trial.[40] And in this country today the right to change of venue is generally guaranteed in all felonies and misdemeanors or in all courts of general criminal jurisdiction.[41] The American Bar Association's *Standards Relating to Fair Trial and Free Press* contemplate no distinction between felonies and misdemeanors, but provide

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(99 N.W. at 775). See generally *Crocker* v. *Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911), quoted *supra*, n. 11.

[40] See *Barry* v. *Truax*, 13 N.D. 131, 99 N.W. 769, 772 (1904), quoted *supra*, n. 11.

[41] See constitutional and statutory provisions, and court rules cited *supra* n. 12.

Some states provide for a different standard of proof in less serious cases. Thus Indiana and Maryland provide an absolute right to change of venue in capital cases, but in noncapital cases the defendant must show that he cannot obtain a fair trial without a change. IND. RULES OF PROCEDURE, TR 77, CR 12 (1970); MD. CONST. Art. IV, §8, MD. ANN. CODE Art. 75, §44 (1957). And in Pennsylvania the Constitution provides for the right to change of venue in all "criminal cases"; the statute provides for change of venue in felonies whenever the defendant shows the court a fair trial can't be had, but in all other criminal cases the defendant is entitled to change of venue only after he has made an unsuccessful attempt to select an impartial jury and files an affidavit by some credible witness alleging he can't get a fair trial. PA. CONST. Art. III, §23, PA. STAT. ANN. Tit. 19, §551 (1930).

The New Hampshire constitutional provision providing for change of venue in "cases of general insurrection" has been interpreted as limiting the right to change of venue only by the state and not the defendant. N.H. CONST. Pt. I, Art. 17; *State* v. *Sawtelle*, 66 N.H. 488, 32 A. 831 (1891). *State* v. *Albee*, 61 N.H. 423, 60 Am. Rep. 325 (1881), specifically held that notwithstanding the constitutional language, courts of general jurisdiction had inherent common law power to change venue in criminal cases on the defendant's motion. N.Y. CODE CRIM. P. §344 provides for change of venue in cases prosecuted by indictment, but *People* v. *Ryan*, 38 N.Y. Supp. 2d 806 (1942), held that a defendant charged by information had a right to change of venue if he could show danger of not obtaining a fair trial. MASS. ANN. LAWS ch. 277, §51 provides for a change of venue in capital crimes, but *Crocker* v. *Justices of Superior Ct.*, 208 Mass. 162, 94 N.E. 369 (1911), held that this statute was only declaratory of rights al-

for change of venue in all criminal cases whenever there is danger that a fair trial cannot be had (section 3.2, pp. 8-10).

The only cases appellant has found dealing with statutes similar to Wisconsin's have found the denial of change of venue in misdemeanor cases unconstitutional. *Mason* v. *Pamplin*, 232 F. Supp. 539 (W.D. Tex. 1964), *aff'd sub nom. Pamplin* v. *Mason*, 364 F.2d 1 (5th Cir. 1966) (decided prior to this Court's decisions in *Duncan* and *Baldwin*, *supra*), involved a strikingly similar factual situation. There a clergyman, active in civil rights causes, was accused of striking a police official in the course of being arrested in connection with a civil rights demonstration. He was charged with aggravated assault upon a police officer, a misdemeanor in Texas. His motion for a change of venue was denied because Texas statutes provided for change of venue by reason of community prejudice only

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ready existing, and that it could not limit the inherent right of courts of general jurisdiction to grant changes of venue in all criminal cases.

Idaho may limit the right to change of venue to offenses prosecuted by indictment. IDAHO CODE ANN. §19-1801 (1948); but see §19-1304. IOWA CODE ANN. §778.1 (1946) appears to limit change of venue to felony cases, but §762.13 provides for change of venue in the justice court in nonindictable offenses. MINN. STAT. ANN. §627.01 (1947) provides for change of venue in cases where the offense is punishable by death or imprisonment in the state prison; but in *State* v. *Thompson*, 273 Minn. 1, 139 N.W.2d 490 (1966), *cert. denied*, 385 U.S. 817 (1966), the court said that this same statute's provision that only one change of venue could be had could not limit a defendant's right to a further change if it was necessary to protect the right to a fair trial.

A number of states have recently amended their statutes or rules to specifically provide for change of venue in misdemeanors and other non-felony offenses. See, *e.g.*, TEX. CODE CRIM. P. ANN. Art. 31.01 (1966) ("any case of felony or misdemeanor"); S.D. COMP. LAWS §23-28-7 (1967); VT. STAT. ANN. Tit. 13, §4631 (1969) (person under information, complaint or indictment for any offense can move for change of venue).

in felony cases. Subsequent to his trial, conviction, and exhaustion of state remedies, a federal court held that the change of venue statute violated the Due Process Clause of the Fourteenth Amendment, reasoning that *Irvin* made clear, if there was any doubt before, the "inherent right of an individual to a change of venue" where community prejudice threatens a fair trial (232 F. Supp. at 541). The court found, therefore, that denial of opportunity to show prejudice on a motion for change of venue could not be remedied by *voir dire* proceedings or by post-verdict motions (232 F. Supp. at 542-43). In affirming, the Fifth Circuit declared that: "[d]ue process of law requires a trial before a jury drawn from a community of people free from inherently suspect circumstances of racial prejudice against a particular defendant"; and held that "the same constitutional safeguard of an impartial jury is available to a man denied his liberty . . . for a misdemeanor as a felony." [42]

Similarly, long before this Court's decisions in *Irvin* and *Rideau, supra,* the Supreme Court of Oregon recognized that the federal and state constitutional rights to an impartial trial included the right to a change of venue, and declared unconstitutional on due process grounds state statutes permitting a change of venue in felony cases only. *State ex rel. Rico* v. *Biggs,* 198 Ore. 413, 255 P.2d 1055 (1953).

Appellant submits, in conclusion, that Wisconsin's statute denying defendants in misdemeanor cases the right to a change of venue violates the Sixth and Fourteenth Amendments to the United States Constitution.

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[42] 364 F.2d at 7. The court found immaterial the fact that there was no evidence of community prejudice in the record and that the *voir dire* did not demonstrate community prejudice (364 F.2d at 6-7).

II.

Wis. Stat. Ann. §956.03(3) Violates the Equal Protection Clause of the Fourteenth Amendment in Denying Persons Charged With a Misdemeanor the Right to a Change of Venue Granted Persons Charged With a Felony.

Apart from whether a criminal defendant is constitutionally entitled to a right to change of venue in order to protect his right to an impartial jury trial, it is at least clear that where a state grants a right to change of venue to some criminal defendants, it cannot deny that right to any arbitrarily selected class of defendants.[43] Where a State chooses to grant an advantage to one class and not to others "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." [44] While absolute equality is not required, it is at least clear that a State cannot discriminate irrationally in providing criminal defendants with procedural protections its deems an important part of its system of criminal justice. See, *e.g.*, *Douglas* v. *California*, 372 U.S. 353, 356-57 (1962).

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[43] Thus in *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956), this Court held that where a State grants appellate review, even though it is not required to do so by the Federal Constitution, it can't grant it in a manner that discriminates against an arbitrarily selected class, without violating the Equal Protection Clause of the Fourteenth Amendment.

[44] *Gulf, Colorado and Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155, 159 (1897); *Skinner* v. *Oklahoma*, 316 U.S. 536 (1942); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

The right to change of venue which Wisconsin grants all felony defendants is clearly considered a fundamental procedural safeguard, essential to protect the defendant's right to an impartial jury trial. See p. 25 and n. 27, *supra*. It is appellant's contention that it is a violation of Equal Protection to deny the same right to misdemeanor defendants since there is no adequate distinction between felonies and misdemeanors relevant to factors bearing on the need for a change of venue. As noted *supra* pp. 27-29, the factors contributing to community prejudice may have little or nothing to do with whether the crime charged is classified as a misdemeanor.

The court below quoted a previous decision outlining certain distinctions between felonies and misdemeanors in Wisconsin:

> ". . . In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors . . ." *State ex rel. Gaynon* v. *Krueger*, 31 Wis. 2d 609, 620, 143 N.W.2d 437 (1966). (A. 209)

But these distinctions appear to bear no relationship to the need for a change of venue in order to ensure an impartial trial. This Court rejected in *Baldwin* v. *New York*, 38 U.S. L.Wk. 4554, 4555 (1970), the notion that such traditional distinctions between misdemeanors and felonies were of any particular relevance in determining what class of criminal defendants should be accorded the fundamental

right to jury trial. And in *State ex rel. Plutshak* v. *State Department of Health and Social Services,* 37 Wis. 2d 713, 155 N.W.2d 549, 157 N.W.2d 567 (1968), the Wisconsin Supreme Court recognized that in determining the right to assigned counsel, the distinction between misdemeanor and felony was of no particular significance, and that instead counsel should be assigned in all cases where the potential maximum penalty exceeded six months.[45] Most important, in the analogous situations involving change of venue in trials by the court, and determination of qualifications of and challenges to jurors, Wisconsin makes no distinction between felonies and misdemeanors. WIS. STAT. ANN. §956.03; §§270.16, 957.14, 957.03, 957.04.

Moreover, it is clear that while some distinctions are drawn between felonies and misdemeanors in Wisconsin, there is no apparent principle governing the classification of offenses. Wisconsin has defined a felony as "[a] crime punishable by imprisonment in the state prison," and a misdemeanor as "every other crime." WIS. STAT. ANN. §939.60 (1955). But there are situations in which misdemeanants may be imprisoned in state prison, and felons incarcerated in the county jail.[46] WIS. STAT. ANN. §959.044 (1945) provides that the place of imprisonment, where none is designated by statute, depends on the length of sentence: the county jail if the maximum is less than one year; the state prison if the maximum is more than one year; and either where the maximum is one year. But this of course does

[45] See also *Duncan* v. *Louisiana,* 391 U.S. 145, 159-62 (1968); *Beck* v. *Winters,* 407 F.2d 125 (8th Cir. 1969); *Harvey* v. *Mississippi,* 340 F.2d 263, 269 (5th Cir. 1965); *James* v. *Headley,* 410 F.2d 325, 328 (5th Cir. 1969).

[46] See Note, *Wisconsin Criminal Procedure,* 1966 WIS. L. REV. 430, 488; *Pruitt* v. *State,* 16 Wis. 2d 169, 114 N.W.2d 148 (1962).

not mean that length of sentence necessarily determines whether a crime is a misdemeanor or felony since many Wisconsin statutes still designate the degree of the crime and/or the place of imprisonment. Also, under Wisconsin's repeater laws, misdemeanors may bring increased penalties and incarceration in state prison without changing the degree of the crime for purposes of the procedural protections provided.[47] Finally, there is considerable confusion and difficulty in determining whether certain offenses are in fact misdemeanors or felonies.[48] Thus there is plainly nothing categorical about the felony-misdemeanor distinction, nor anything inherent in its logic.

Since the distinction between felony and misdemeanor in Wisconsin is based on no coherent or consistent principle of classification, and since it is totally unrelated to the reasons that change of venue should be granted a criminal defendant, the Wisconsin statute denying that right to persons charged with a misdemeanor violates the Equal Protection Clause of the Fourteenth Amendment.

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[47] Wis. Stat. Ann. §939.62 (1957); *State* v. *Watkins*, 40 Wis. 2d 398, 162 N.W.2d 48 (1968); *Harms* v. *State*, 36 Wis. 2d 282, 153 N.W.2d 78 (1967).

[48] See generally *State ex rel. Gaynon* v. *Krueger*, 31 Wis. 2d 609, 143 N.W.2d 437 (1966); Lipton, *The Classification of Crimes in Wisconsin*, 50 Marq. L. Rev. 346 (1966).

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial at which appellant would be entitled to change of venue on a showing that community prejudice was such that he could not obtain an impartial jury trial in Milwaukee County.

Respectfully submitted,

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